sFiled 9/20/06 Conservatorship of Ziegler CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

Conservatorship of the Estate of EDNA ZIEGLER	B183892 (Los Angeles County Super. Ct. No. BP084280)
EDNA ZIEGLER, Petitioner and Respondent, v. CEDRIC GREENE, Objector and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, James E. Satt, Judge. Affirmed.

Law Office of Felicia A. Mobley and Felicia A. Mobley for Objector and Appellant.

Law Office of Randall & Associates and Betty G. Barrington for Petitioner and Respondent.

BACKGROUND

On March 30, 2004, the conservator of the estate of respondent Edna Ziegler filed a petition to cancel a deed conveying respondent's real property to appellant Cedric Greene and to convey the property to the conservatorship estate. In addition, the petition prayed for damages, punitive damages, and attorney fees pursuant to the Elder Abuse and Dependent Adult Civil Protection Act.[1] Appellant filed an objection to the petition, and the matter was tried to the probate court on May 2, 3, and 4, 2005. Judgment was entered May 9, 2005, in favor of the conservatorship estate and against appellant. Appellant filed a timely notice of appeal from the judgment on June 7, 2005.

DISCUSSION

1. *The Findings are Presumed Correct and Supported by the Evidence*

Both appellant and respondent refer to the judgment as a statement of decision, but there was no adherence to the procedure set forth in Code of Civil Procedure section 632 for the settlement and issuance of statements of decision. That procedure is applicable to probate proceedings. (Prob. Code, § 1000; see *Estate of Kauffman* (1944) 63 Cal.App.2d 655, 660.)[2]

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[1] See generally Welfare and Institutions Code section 15600 et seq., and see section 15610.30, defining financial abuse of elders.

[2] Section 632 of the Code of Civil Procedure provides, in part: "The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day[,] in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested

The judgment included the probate court's findings and conclusions, although there is no tentative decision in the record or listed on the superior court docket, and the probate court did not orally announce the decision. Appellant does not contend that he requested a statement of decision at any time, or that he objected to the probate court's inclusion of its findings of fact and conclusions of law in the final judgment, without first issuing a tentative decision.

Because appellant neither requested a statement of decision nor objected to the court's findings, he has waived the right to complain of defective findings on appeal, and we must imply all necessary findings in favor of respondent. (See *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 139-141.)[3] Further, the findings are presumed to be correct. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

2. *The Findings*

Because the probate court's findings are presumed correct, we recite them nearly verbatim before discussing appellant's contentions.

> "Edna Ziegler, the 79 year old conservatee, was fraudulently induced to transfer her ownership of real property [on] South Denker Avenue . . . to Onie B. Wilborn mother of Cedric Greene. Cedric Greene fraudulently represented to Beatrice Ziegler, daughter of Edna Ziegler, with the intent that the misrepresentation be conveyed to Edna Ziegler that he would loan $16,674.13 to her for the purpose of bringing the loan current. Greene knew the property was in foreclosure and had [his realtor, Bill] Knowles draw up a grant deed to his mother which he induced Edna Ziegler to sign on the false representation that she was signing a loan to repay the amount of the loan foreclosure[.] Additionally, the grant deed stated 'this deed is a bona fide

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the statement, any party may make proposals as to the content of the statement of decision."

[3] Respondent's brief noted that appellant, having failed to object to the court's findings, may not, therefore, challenge them on appeal. Appellant did not file a reply brief.

gift,' which it was not. Terry Williams the loan officer, . . . prepared documents for Beatrice's signature, Exhibit 3, [and] she signed upon representation that Greene would also sign it[.] [Exhibit 3] clearly shows the amount was a loan and that Greene would be repaid the sum of $16,674.13 at the rate of $1604.50 a month on or before [October 12, 2003]. As of January 2004 Beatrice had paid $22,005.09 to Greene when he decided that she was in arrears for payment of rent and brought an Unlawful Detainer action to remove her from the subject property. The sheriff removed her under a Writ of Execution. Under the law she could not litigate title in the unlawful detainer action. Greene's defense is that he explained to the daughter that he would advance the money to cure the foreclosure and that Beatrice should discuss this with her mother and have the mother transfer the property to him, Beatrice would then rent the property from him at the rate of $1604.50 a month. The objector's testimony was not creditable [*sic*].

"Greene testified that he took his mother to Washington Mutual Bank on Jan[uary] 1, 2003 and Onie B. Wilburn executed a grant deed of the subject property to him and her signature was notarized by Terry Williams on that date. The court takes judicial notice that January 1, 2003 is a holiday. The deed was not recorded until Nov[ember] 12, 2003.

"On Feb[ruary] 21, 2004 Greene executed and signed a deed of trust securing a loan of $198,750[] on the subject property, paying off the loan of the conservatee which was in the sum of $138,563.46 on Oct[ober] 12, 2002 and had been reduced to $136,647.05 by Jan[uary]12, 2004.

"The conservatee and her daughter had demanded that Greene return the subject property to the conservatee but Greene refused on the sham statement that the property belonged to him and she had no interest in the property.

"All of objector's action[s] and representations were done with the intent to defraud the conservatee and the statements that the money advanced would be a loan was with an intent to deceive and was for the purpose of gaining an advantage and to induce her to part with her property. Greene suppressed the truth that this was a transfer of the real property to his mother, on his behalf, and was done in bad faith. The refusal to return the property was also done in bad faith with knowledge that the conservatee had a right to have the property transferred to her. All in violation of Welfare

[and] Institutions Code [section] 15610.30 by clear and convincing evidence done with malice and fraud."

3. *Substantial Evidence Review has been Waived*

Appellant appears to believe that he is entitled to a de novo review on appeal. He contends that the standard of review on appeal is the same as the plaintiff's burden in the trial court, viz., to show reckless, oppressive, fraudulent, or malicious conduct by clear and convincing evidence, before punitive damages may be imposed. (See Welf. & Inst. Code, § 15657.5, subd. (b).) Other issues are proven in the trial court by a preponderance of the evidence. (See *ibid*.) As respondent has pointed out, however, standards of proof provide guidance to the trial court only, and are not intended as standards for appellate review. (See *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 602-603.) Because appellant has waived any deficiencies in the findings of the probate court, the only remaining challenge to the judgment would be a contention that it is not supported by substantial evidence. (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928.)

In subsections A through D of section VII in his opening brief, appellant challenges several of the probate court's findings on the ground that they were not supported by substantial evidence. Without a single citation to the reporter's transcript, appellant contends, in effect, that there was insufficient evidence to support the following express and implied findings: (1) that exhibit 3, the document that respondent offered as the loan agreement, was authentic; (2) that respondent repaid all sums lent to her by appellant; (3) that appellant acted in bad faith and his acts constituted elder abuse; and (4) that the amount of punitive and compensatory damages awarded was appropriate.

"'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted

or uncontradicted which will support the finding of fact.' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, original italics.) The judgment is presumed to be correct (*In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1133), and we presume that the record contains evidence to sustain every finding of fact. (*Foreman & Clark Corp. v. Fallon*, at p. 881.) It is the appellant's burden to demonstrate that it does not. (*Ibid*.)

In furtherance of its burden, the appellant also has the duty to fairly summarize the facts in the light most favorable to the judgment. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.) This means that the trial evidence must be summarized in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving any conflicts in support of the judgment. (*Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429.)

Appellant has done just the opposite. The statement of facts in appellant's opening brief consists of argument, identification of omitted findings and inconsistencies in the testimony, disagreement with the probate court's assessment of the credibility of respondent and her daughter, and a discussion of competing inferences appellant argues should have been drawn in his favor, based upon his testimony and pleadings. Although his argument contains no citations to the record, he urges this court to reverse the trial court's findings because "if [appellant's] version is accepted, then everything makes sense."

Appellant ignores the obvious, namely, that his version was <u>not</u> accepted by the probate court. Indeed, the court expressly and unequivocally found appellant's testimony not credible. We are bound by the probate court's resolution of issues of credibility. (*Estate of Teel* (1944) 25 Cal.2d 520, 526.) This leaves a record consisting of respondent's version of events and all evidence supporting that version. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

Appellant's decision to ignore respondent's version of events in favor of his own constitutes a failure of his obligation to summarize the evidence in the light most favorable to respondent. This failure effects a waiver of his contention that the judgment is unsupported by substantial evidence. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.)

4. *The Excessive Damage Claims have not been Preserved*

Appellant contends that punitive damages were excessive, because there was insufficient evidence of his wealth or financial condition.[4] He also contends that the amount of compensatory damages awarded was excessive, because the evidence showed that respondent did not repay the loan he provided to bring her mortgage current. The probate court expressly found that as of January 2004, Beatrice Ziegler had made payments on appellant's loan to respondent totaling $22,005.09. Further, as we have previously discussed, any implied findings necessary to the judgment are inferred, because appellant failed to request a statement of decision or challenge the probate court's findings prior to appeal. (*In re Marriage of Arceneaux, supra*, 51 Cal.3d at p. 1133; Code Civ. Proc., §§ 632, 634.)

Appellant has forfeited his challenge to the punitive and compensatory damage awards for an additional reason. "'The point that damages are excessive cannot be raised for the first time on appeal, but must be presented to the lower

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[4] In a three-sentence undeveloped argument in the section of his opening brief regarding punitive damages, appellant also challenges the award of damages for respondent's emotional distress. The appellate court is not required to examine undeveloped claims. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106.). Further, rule 14(a)(1)(B) of the California Rules of Court requires that each point in an appellate brief must be stated under a separate heading or subheading summarizing the point. Because appellant failed to follow this rule, we decline to address the point. (See *Marvin Lieblein, Inc. v. Shewry* (2006) 137 Cal.App.4th 700, 720, fn.13.)

court on [a] motion for new trial.'" (*Schroeder v. Auto Driveaway Co*. (1974) 11 Cal.3d 908, 918, quoting *Bate v. Jolin* (1929) 206 Cal. 504, 508, fn. omitted; Code Civ. Proc., § 657; Prob. Code, § 1000.) The trial court is in a far better position than an appellate court to review a damage award. (*Schroeder v. Auto Driveaway Co.*, *supra*, at p. 919.) "In reviewing that issue, moreover, the trial court is vested with the power, denied to us, to weigh the evidence and resolve issues of credibility. [Citation.] When defendants first challenge the damage award on appeal, without a motion for a new trial, they unnecessarily burden the appellate courts with issues which can and should be resolved at the trial level." (*Ibid.*, fn. omitted.)

Thus, although appellant could have brought a motion for new trial, he does not claim to have done so, and no such motion appears on the superior court docket. Appellant has not, therefore, preserved for appeal the issues of excessive compensatory and punitive damages. (See *Schroeder v. Auto Driveaway Co.*, *supra*, 11 Cal.3d at pp. 918-919.)[5]

5. *Best Evidence*

Appellant contends that the trial court erred in admitting copies of the checks respondent gave to appellant pursuant to their agreement. His trial objection was based upon the best evidence rule, which, far from being expanded, as appellant contends, has been eliminated. (See Recommendation on Best Evidence Rule (Nov. 1996) 26 Cal. Law Revision Com. Rep. (1996) p. 369.) The best evidence rule was found in former Evidence Code section 1500, which was

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5 We do not reach respondent's contention that the probate court was required to impose punitive damages by Civil Code section 2945.6, as liability under that statute was not pleaded. "While courts should not be technical in the matter of pleading, a plaintiff should not be permitted to base [the] entire complaint on one theory, and then later adopt another theory which is not even hinted at in the pleading." (*Love v. Gulyas* (1948) 87 Cal.App.2d 608, 615.)

repealed and replaced with the secondary evidence rule. (See Evid. Code, § 1520 et seq.; Stats. 1998, ch. 100, §§ 1, 2.) The secondary evidence rule provides that the "content of a writing may be proved by otherwise admissible secondary evidence." (Evid. Code, § 1521, subd. (a).)

Rulings on the admissibility of evidence are reviewed for an abuse of discretion. (*Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059, 1078.) "'Where the issue on appeal is whether the trial court has abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion: *"An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge*. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice . . . ." [Citation.]' [Citation.]" (*Dolan v. Buena Engineers, Inc*. (1994) 24 Cal.App.4th 1500, 1504, original italics.)

Appellant's showing is insufficient -- even to support a different opinion. He contends that trial exhibit 4 was a copy of respondent's cancelled checks with handwritten notations. Appellant did not have the original trial exhibits transmitted to this court, and there are only photocopies of the exhibit, submitted with a motion to augment the record, which we granted. Exhibit 4 does not appear to consist of cancelled checks, as appellant claims, but of receipts for money orders and cashier's checks. Respondent's counsel referred to them as receipts, and made it clear to the court that they were not copies of the original money orders or cashier's checks.

Appellant contends that the court was required to exclude exhibit 4 under Evidence Code section 1523, which prohibits the use of oral testimony to prove the content of a writing, except as otherwise provided by statute. There was no need

for testimony to prove the content of the writings, however, because they were physically before the court. Further, appellant has failed to refer to the page number in the record where such testimony may be found, and does not even provide a summary of it. However, our review of the record reveals that Beatrice Ziegler's testimony addressed the authenticity of the receipts and the handwritten notations she made on them at the time she purchased them.

Appellant also contends that exhibit 4 was inadmissible because secondary evidence must be excluded if the court determines either that a "genuine dispute exists concerning material terms of the writing and justice requires the exclusion" or that "[a]dmission of the secondary evidence would be unfair." (Evid. Code, § 1521, subd. (a)(1) & (2).) Appellant refers to no evidence compelling either determination, however, stating simply that respondent made no showing that the original checks were lost or unobtainable. As the exhibit did not consist of copies of the original checks, appellant's argument is irrelevant. Moreover, the testimony that the notations were made at the time of purchase was uncontradicted.

Again failing to refer to the record, appellant alleges that there is "no way" to determine when the handwritten notations were made. It is not the province of the reviewing court to search the record in order to ascertain whether it does or does not contain evidence which will support a claim of error. (*Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 356.) Any argument which relies upon the evidence must be supported by appropriate reference to the record. (Cal. Rules of Court, rule 14(a)(1)(C).) Appellant's burden to support his arguments by appropriate reference to the record includes providing exact page citations. (*Bernard v. Hartford Fire Ins. Co*. (1991) 226 Cal.App.3d 1203, 1205.)

Nevertheless, respondent's brief provides appropriate references to the record showing that, in fact, Beatrice Ziegler testified that she made the notations on the receipts at the time she purchased the money orders. Thus, appellant's

claim that it is impossible to determine when the handwritten notations were made is a misrepresentation of the evidence. We conclude that appellant has not met his burden to establish an abuse of discretion. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

6. *Failure to Order Reimbursement*

Appellant's final contention is that the probate court should have ordered respondent to reimburse him for the mortgage payments he claims to have paid on her behalf, amounting to more than $36,000. Once again, appellant fails to refer to the record. Further, he fails to cite any authority in support of his argument.

Pleadings in probate matters include petitions and objections. (Cf. Prob. Code, §§ 1020, 1021.) Appellant does not claim to have filed a petition seeking affirmative relief, and the probate court's docket shows none. His objection does not plead an offset or demand affirmative relief. Nor does appellant's trial brief mention a request for an offset. Appellant fails to explain how the probate court might have erred in failing to grant relief he never requested.

Appellant's argument might be construed, in effect, as a contention that the amount of damages awarded was excessive and not supported by substantial evidence. We have already discussed appellant's forfeiture of substantial evidence issues by failing to summarize the evidence fairly and in the light most favorable to respondent. (*Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881; *Western Aggregates, Inc. v. County of Yuba*, *supra*, 101 Cal.App.4th at p. 290.) Appellant's failure to support his argument with citation to the record or to legal authority also effects a forfeiture. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1443-1444.)

DISPOSITION

The judgment is affirmed. Respondent shall have her costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.